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21 Pulse Evolution Corporation and John Textor

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

20 HOLOGRAM USA, INC., a Delaware corporation; MUSION DAS
21 HOLOGRAM LIMITED, a corporation organized under the laws of the United Kingdom; and UWE MAASS, an individual,

Plaintiffs,
vs.

PULSE EVOLUTION CORPORATION, a Nevada corporation; PULSE ENTERTAINMENT CORPORATION, a Delaware corporation; JOHN C. TEXTOR, an individual; DICK CLARK PRODUCTIONS, INC., a Delaware corporation; JOHN BRANCA and JOHN MCCLAIN, Executors of the Estate of

2 Case No.: 2:14-cv-00772-GMN-NJK
3 DEFENDANTS PULSE
4 ENTERTAINMENT
5 CORPORATION, PULSE
6 EVOLUTION CORPORATION AND
7 JOHN TEXTOR'S NOTICE OF
8 MOTION AND MOTION TO
9 DISMISS PURSUANT TO FRCP
10 12(b)(6) AND 12(b)(3) OR,
11 ALTERNATIVELY: (1) MOTION
12 FOR MORE DEFINITE
13 STATEMENT PURSUANT TO FRCP
14 12(e) AND, (2) MOTION TO STAY
15 THE ACTION PENDING
16 RESOLUTION OF ARBITRATION;
17 MEMORANDUM OF POINTS AND
18 AUTHORITIES

1 Michael J. Jackson; MJJ
2 PRODUCTIONS, INC., a California
3 corporation; MUSION EVENTS LTD., a
United Kingdom private company;
4 MUSION 3D LTD., a United Kingdom
private company; WILLIAM JAMES
ROCK, an individual; IAN
5 CHRISTOPHER O'CONNELL, an
individual; and DOES 1 through 10,
Defendants.
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} [Filed concurrently with Supporting
Declaration of Mark Deem;
[Proposed] Order]
[FRCP 12(b)(6), 12(b)(13), 12(e)]
(Hearing Requested)

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE that Defendants Pulse Entertainment Corporation, Pulse
3 Evolution Corporation and John Textor (collectively “Defendants”) hereby move for an
4 order dismissing Plaintiffs Hologram USA, Inc., Musion Das Hologram Limited and
5 Uwe Maass’ (collectively, “Plaintiffs”) First Amended Complaint (“FAC”), pursuant to
6 FRCP 12(b)(3), 12(b)(6), and the applicable Local Rules of Court, and request a hearing
7 thereon in Courtroom 7-D of the above referenced Court. This motion is made on the
8 following grounds:

9 1. Plaintiffs’ First Claim for Relief for Infringement of Patent No. 5,865,519
10 (the “‘519 Patent”), Second Claim for Relief for Infringement of Patent No. 7,883,212
11 (the “‘212 Patent”), Third Claim for Relief for Willful Infringement of the ‘519 and ‘212
12 Patents, Fourth Claim for Relief for Active Inducement of Infringement of the ‘519 and
13 ‘212 Patents, and Fifth Claim for Relief for Contributory Infringement of the ‘519 and
14 ‘212 Patents, each fail to state a claim upon which relief can be granted against
15 Defendants. Each of the claims for relief against Defendants for direct infringement
16 (claims one, two and three) are based on the same act as the claims for indirect
17 infringement (claims four and five), *i.e.*, infringement of the ‘519 and ‘212 patents in
18 connection with a virtual Michael Jackson performance at the 2014 Billboard Music
19 Awards. It is well-established that claims for both direct and indirect patent infringement
20 against a defendant, where based on the same act, are mutually exclusive. Further,
21 Plaintiffs’ allegations do not meet the pleading requirements of FRCP 8(a), 8(e) and
22 10(b).

23 2. Venue is improper as to Defendant Textor, who is sued as an individual,
24 because he neither resides nor has a regular and established place of business in this
25 district as required for patent actions under 28 U.S.C. § 1400(b).

26 3. Alternatively, Defendants hereby move this Court under FRCP 12(e) for a
27 more definite statement. As fully discussed in Defendants’ Memorandum of Points and
28 Authorities submitted herewith, the allegations of the FAC are so vague and ambiguous

1 that Defendants cannot reasonably be required to frame a responsive pleading to the
2 current FAC.

3 4. Defendants also move, as a form of alternative relief, to stay the action
4 pending resolution of an ongoing arbitration in the London Court of International
5 Arbitration which involves several parties to the instant action (Plaintiff Uwe Maass, and
6 Defendants Ian O'Connell and John Rock) and overlapping issues of fact and law (*i.e.*,
7 rights and assignability of the '519 and '212 patents). In the event that the arbitration
8 award results in a finding that Maass and Musion Das Hologram Limited do not have the
9 legal capability of issuing a license to third parties such as Hologram USA, Inc., then
10 Defendants contend that Plaintiffs will lack standing to proceed with this action
11 altogether.

12 This motion is made and based on this Notice, the Memorandum of Points and
13 Authorities filed herewith, any matters of which this Court may take judicial notice, all
14 papers on file herein, and on such other arguments and evidence as may be presented at
15 the time of the hearing on this matter.

16 Counsel for Defendants will comply with LR IA 10-2 within 15 days.
17

18 Dated: June 24, 2014

MARTIN D. SINGER
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LAVELY & SINGER
PROFESSIONAL CORPORATION

21 By: /s/ Martin D. Singer
22 MARTIN D. SINGER
23 Attorneys for PULSE ENTERTAINMENT
24 CORPORATION, PULSE EVOLUTION
25 CORPORATION and JOHN TEXTOR
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 As alleged in the First Amended Complaint (“FAC”), this action arises out of the
4 2014 Billboard Music Awards at the MGM Grand, in which a virtual Michael Jackson
5 performed the previously unreleased song, “Slave to the Rhythm.” FAC, ¶3. The
6 performance was the result of highly-sophisticated digital animation created and
7 developed by Defendant Pulse Entertainment Corporation (“Pulse Entertainment”).
8 Plaintiffs Hologram USA, Inc. (“Hologram USA”), Musion Das Hologram Limited
9 (“Musion Das Hologram”) and Uwe Maass (“Maass”) allege that the virtual Michael
10 Jackson performance was displayed at the 2014 Billboard Music Awards using a
11 projection technique which infringes on two patents owned or controlled by Plaintiffs,
12 including Patent No. 5,865,519 (the ““519 Patent”), and Patent No. 7,883,212 (the ““212
13 Patent”). FAC, ¶¶ 2, 3.

The FAC alleges six claims for relief against each of the Defendants Pulse Entertainment, Pulse Evolution Corporation (“Pulse Evolution”) and John Textor (“Textor”) (collectively, “Defendants”) arising out of the virtual Michael Jackson performance at the 2014 Billboard Music Awards, including the First Claim for Relief for Infringement of the ‘519 Patent, Second Claim for Relief for Infringement of the ‘212 Patent, Third Claim for Relief for Willful Infringement of the ‘519 and ‘212 Patents, Fourth Claim for Relief for Active Inducement of the ‘519 and ‘212 Patents, Fifth Claim for Relief for Contributory Infringement of the ‘519 and ‘212 Patents and Sixth Claim for Preliminary and Permanent Injunction. FAC ¶¶ 48-91. Plaintiffs’ purported patents relate to a variation on the “Pepper’s Ghost” illusion technique which was first conceived hundreds of years ago. FAC ¶1; Declaration of Mark Deem (“Deem Decl.”), ¶2.

Defendants submit that Plaintiffs’ claims will fail because Defendants did not use, let alone infringe, the obsolete technology covered by the narrowly-drawn and specific ‘519 and ‘212 patents at the 2014 Billboard Music Awards.

1 By this Motion, Defendants seek dismissal of Plaintiffs' FAC as the first, second,
 2 third, fourth and fifth claims for relief for failure to state a claim upon which relief can be
 3 granted against them, pursuant to FRCP 12(b)(6). Each of the claims for relief against
 4 Defendants for direct infringement (claims one, two and three) are based on the same act
 5 as the claims for indirect infringement (claims four and five), *i.e.*, infringement of the
 6 '519 and '212 patents in connection with the virtual Michael Jackson performance at the
 7 2014 Billboard Music Awards. It is well-established that claims for both direct and
 8 indirect patent infringement against a defendant, where based on the same act, are
 9 mutually exclusive. Further, Plaintiffs' allegations do not meet the pleading requirements
 10 of FRCP 8(a), 8(e) and 10(b).¹

11 Defendant Textor, who is sued individually, also moves pursuant to FRCP 12(b)(3)
 12 to dismiss the FAC on the independent grounds that venue is improper in this patent
 13 action because he neither resides nor has a regular and established place of business in
 14 this district as required for patent actions under 28 U.S.C. § 1400(b).

15 Defendants also move, as a form of alternative relief, to stay the action. In the
 16 FAC, Hologram USA alleges that it acquired exclusive rights to exploit the '519 and '212
 17 patents directly from Musion Das Hologram and Maass. FAC, ¶2. However, the issue of
 18 whether Musion Das Hologram and Maass were legally capable of licensing the rights in
 19 the first place is currently in dispute in an arbitration pending in London. Deem Decl.,
 20 ¶¶2-11. Parties to this action, including Maass, Ian O'Connell and James Rock, are
 21 parties to the London arbitration. *Id.* The arbitration award is likely to directly impact
 22 Plaintiffs' claim of rights to the '519 and '212 patents. If the arbitration is decided
 23 against Maas, for example, it will directly impact Plaintiffs' standing to proceed with this
 24 action altogether, *i.e.*, if it is determined that Musion Das Hologram and Maass simply
 25 did not have the right to license the '519 and '212 patents to third parties including

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 27
 28 ¹ Alternatively, Defendants move this Court under FRCP 12(e) for a more definite statement. Aspects of
 the allegations of the FAC are so vague and ambiguous that Defendants cannot reasonably be required to
 frame a responsive pleading to the current FAC.

1 Hologram USA, and that such rights were, in fact, controlled by another unrelated entity,
 2 then Plaintiffs will lack standing to sue for patent infringement in the instant action.

3 **II. LEGAL ARGUMENT**

4 **A. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE**
 5 **GRANTED**

6 This Court is well-versed in the standards governing dismissal of a Complaint for
 7 failure to state a claim upon which relief can be granted. A motion to dismiss under
 8 FRCP 12(b)(6) tests the legal sufficiency of a claim stated in a Complaint. *Ileto v. Glock,*
 9 *Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). The court must decide whether the facts
 10 alleged, if true, would entitle the claimant to relief under the law. Dismissal can be based
 11 either on the lack of a cognizable legal theory or the absence of sufficient facts alleged
 12 under a cognizable legal theory. See *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696,
 13 699 (9th Cir. 1990). Furthermore, “[t]o survive a motion to dismiss, a Complaint must
 14 contain sufficient factual matter, accepted as true, to state a claim to relief that is
 15 plausible on its face.” *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1129 (9th Cir. 2013)
 16 quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). “Bare assertions are insufficient.”
 17 *Salameh, supra*, 726 F.3d at 1129.

18 **1. Claims for Direct Infringement And Indirect Infringement Are**
 19 **Mutually Exclusive When The Claims Are Based On The Same**
 20 **Act, Requiring Dismissal of Claims 1 - 5**

21 Each of the claims for relief against Defendants for direct infringement (claims
 22 one, two and three) are based on the same act as the claims for indirect infringement
 23 (claims four and five), *i.e.*, infringement of the ‘519 and ‘212 patents at the 2014
 24 Billboard Music Awards. Infringement by inducement and contributory infringement
 25 constitute “indirect infringement.” It is well-established that claims for both direct and
 26 indirect patent infringement against a defendant, where based on the same act, are
 27 mutually exclusive. See *Self v. Fisher Controls Co., Inc.*, 566 F.2d 62, 64 (9th Cir. 1977)
 28 (“contributory infringement actions are limited to situations where defendant himself has

1 not directly infringed the patent by making, using or selling the invention, but has
 2 induced someone else to infringe the patent"); *Picker Int'l, Inc. v. Varian Assocs., Inc.*,
 3 661 F.Supp. 347, 350 (N.D. Ohio 1987) ("It is well settled that the doctrine of 'actively
 4 inducing infringement' . . . is not available as a separate source of liability against one
 5 who is also alleged to be a direct infringer."); *SureSafe Industries., Inc. v. C&R Pier
 6 Mfg.*, 850 F.Supp. 869, 873 (S.D.Cal.1993) ("Since plaintiffs have alleged direct
 7 infringement, they have no standing to assert inducing or contributory infringement.");
 8 see also *Pickholtz v. Rainbow Technologies, Inc.*, 260 F.Supp.2d 980, 989-90 (N.D. Cal.
 9 2003); *New Hampshire Ins. Co. v. R.L. Chaides Const. Co., Inc.*, 847 F. Supp. 1452,
 10 1458 (N.D. Cal. 1994); *Jervis B. Webb Co. v. Southern Systems, Inc.*, 495 F. Supp. 145,
 11 147 (E.D. Mich. 1980).

12 The contributory infringement doctrine exists to protect patent rights from
 13 subversion by those who, without directly infringing the patent themselves, engage in
 14 acts designed to facilitate infringement by others. *Dawson Chemical Co. v. Rohm and
 15 Haas Co.*, 448 U.S. 176, 188 (1980). Contributory infringement of a patent is akin to the
 16 tort doctrine of joint tortfeasors and was developed to enable the patentee to secure
 17 protection against those who were not direct infringers of his patent and is now limited to
 18 situations wherein the alleged contributory infringer was dealing with a nonstaple article
 19 which was an integral part of the combination and had no other substantial use. *Stearns
 20 v. Tinker & Rasor*, 252 F.2d 589, 601 (9th Cir. 1957).

21 The first three claims for direct infringement allege that Defendants infringed the
 22 '519 and '212 patents in connection with the virtual Michael Jackson performance at the
 23 2014 Billboard Music Awards. Similarly, each of the claims for indirect infringement
 24 (claims four and five) are based on the same act as the claims for direct infringement, *i.e.*,
 25 infringement of the '519 and '212 patents in connection with the virtual Michael Jackson
 26 performance at the 2014 Billboard Music Awards. For example, the Active Inducement
 27 claim for relief alleges:

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1 “74. . . . The Defendants worked together in secret to create a
 2 holographic performance of Michael Jackson which was unveiled to
 3 the public on live television at the 2014 Billboard Music Awards.
 4 All the Defendants . . . intended to induce each other to infringe the
 5 Patents at Issue, so that the awards show and Jackson’s newly
 6 released album would benefit from a spectacular ‘live’ performance
 7 by Michael Jackson . . . ” FAC, ¶¶74.

8 “76. . . . Textor and Pulse worked with Musion, Rock and O’Connell
 9 to provide and operate the Patented Technology that was used to
 10 create the Jackson hologram . . . As with Rock, Textor was
 11 personally present at the Billboard Music Awards show when the
 12 Jackson hologram was aired to a national audience.” FAC, ¶¶76.

13 Likewise, the Contributory Infringement claim for relief alleges that:

14 “82. In particular, based on information and belief, Textor and
 15 Pulse worked with Musion, Rock and O’Connell to provide and
 16 operate the Patented technology that was used to create the Jackson
 17 hologram for the Billboard Music Awards.” FAC, ¶¶82.

18 Moreover, the fourth and fifth claims for relief for indirect infringement incorporate by
 19 reference each of the allegations of the first, second and third claims for relief for direct
 20 infringement. FAC, ¶¶70, 78.

21 Because each of the claims for relief for indirect infringement incorporate by
 22 reference each of the allegations of the first three claims for relief for direct infringement,
 23 and because they also allege that the infringement arises from the same act as the direct
 24 infringement claims for relief, i.e., the alleged infringement of the ‘519 and ‘212 patents
 25 at the 2014 Billboard Music Awards featuring a virtual Michael Jackson performance,
 26 Plaintiffs fail to state a claim for which relief can be granted. Applying the above-
 27 referenced authorities, which hold that claims for direct infringement and indirect
 28 infringement are mutually exclusive when based on the same act, these claims must be
 dismissed.

29 **2. The Active Inducement Claim for Relief Lacks an Essential**
 30 **Element**

31 To succeed on a claim of patent infringement on an inducement theory, a plaintiff
 32 must prove that the defendant’s actions induced infringing acts and that they knew or
 33 should have known that their actions would induce actual infringement; however, that

1 defendants have knowledge of the acts alleged to constitute infringement is not enough.
 2 *Warner-Lambert Co. v. Apotex Corp.*, 316 F.3d 1348, 1363 (Fed. Cir. 2003). In general
 3 terms, “[a] person induces infringement . . . by actively and knowingly aiding and
 4 abetting another’s direct infringement.” *C.R. Bard, Inc. v. Advanced Cardiovascular
 5 Systems, Inc.*, 911 F.2d 670, 675 (Fed. Cir. 1990).

6 With respect to the claim for induced infringement in the FAC, Plaintiffs plead no
 7 facts identifying whom Moving Defendants allegedly induced to infringe its purported
 8 patents. Accordingly, the FAC fails to plead sufficient facts supporting a patent
 9 infringement claim based on induced infringement. See *Artemi Ltd. v. Safe-Strap Co.,
 10 Inc.*, 947 F.Supp.2d 473, 480 (D.N.J. 2013) (patentee’s conclusory allegation that
 11 competitor “actively induced infringement” of its patent was insufficient to state
 12 plausible claim for indirect infringement, where patentee pled no facts concerning what
 13 competitor allegedly did to induce infringement, or whom it allegedly induced); see also
 14 generally *Superior Indus., LLC v. Thor Global Enters.*, 700 F.3d 1287, 1295–96 (Fed.
 15 Cir. 2012) (concluding that the plaintiff’s complaint fell “far short of pleading facts
 16 necessary to state a plausible claim for either induced or contributory infringement.”);
 17 See also FRCP 8(a), 8(e) and 10(b). Here in particular, where each of the 12 Defendants
 18 are alleged to have engaged in both direct and indirect infringement of the ‘519 and ‘212
 19 patents based on the same act, it is impossible to discern whom was induced to infringe
 20 by Defendants. The allegations of the FAC are so vague and ambiguous that Defendants
 21 cannot reasonably be required to frame a responsive pleading, and, at the very least
 22 Plaintiffs must be ordered to file a more definite statement on this claim.

23 **B. IMPROPER VENUE**

24 Venue is improper as to Defendant Textor, who is sued individually. The situs of
 25 the district court wherein a patent infringement suit may be brought is subject to 28
 26 U.S.C. § 1400(b), which provides:

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1 “Any civil action for patent infringement may be brought in the
 2 judicial district where the defendant resides, or where the defendant
 3 has committed acts of infringement and has a regular and established
 4 place of business.” 28 U.S.C. 1400(b).

5 This section requires that a plaintiff filing an infringement action to establish that
 6 defendant has committed acts of infringement and has a regular and established place of
 7 business within the district. It requires more than minimum contacts necessary for
establishing personal jurisdiction or for satisfying “doing business” test of general venue
provisions of § 1391 of this title. *Stanley Works v. Globemaster, Inc.*, 400 F.Supp. 1325,
 8 1330 (D. Mass. 1975). Ordinarily, venue must be satisfied as to each defendant in an
 9 action. *Hoover Group, Inc. v. Custom Metalcraft, Inc.*, 84 F.3d 1408, 1410 (Fed. Cir.
 10 1996). The plaintiff bears the burden of proof in establishing venue. *Piedmont Label Co.*
 11 *v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979). “The district court of a
 12 district in which is filed a case laying venue in the wrong division or district shall
 13 dismiss, or if it be in the interest of justice, transfer such case to any district or division in
 14 which it could have been brought.” 28 U.S.C. § 1406(a). The Federal Rules permit a
 15 defendant to raise improper venue by motion pursuant to FRCP 12(b)(3).

16 The FAC does not allege that Textor, an individually-named defendant, resides in
 17 Nevada. Nor does the FAC allege that Textor has a regular and established place of
 18 business in Nevada (he does not). FAC, ¶ 10. Indeed, the FAC alleges that Textor
 19 resides in Florida. Applying the above-referenced legal authorities, absent allegations
 20 that Textor either resides in this district, or, alternatively, that he committed acts of
 21 infringement and has a regular and established place in this district (which is not alleged),
 22 venue is not proper and this action must be dismissed pursuant to FRCP 12(b)(3) and 28
 23 U.S.C. §§ 1400, 1406. Alternatively, this Court may transfer all or part of this action to a
 24 district in which it could have been originally brought against Textor.

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1 C. **ALTERNATIVELY, DEFENDANTS REQUEST A STAY OF THE**
 2 **ACTION**

3 In this action, Hologram USA claims it acquired exclusive rights to exploit the
 4 ‘519 and ‘212 patents directly from Musion Das Hologram and Maass. FAC, ¶2.
 5 However, the issue of whether Musion Das Hologram and Maass were capable of
 6 licensing the rights to Hologram USA in the first place is currently in dispute in an
 7 arbitration pending in London. Deem Decl., ¶¶2-11.

8 Last year, contractual arbitration was commenced before the London Court of
 9 International Arbitration (“LCIA”) involving parties to this action (O’Connell, Rock and
 10 Maass) to determine the scope and extent of exploitation rights to the ‘519 and ‘212
 11 patents. Deem Decl., ¶¶2-11. It is proceeding under the terms of an agreement entered
 12 into by Rock, O’Connell and Maas dated June 25, 2007 entitled Heads of Agreement,
 13 Reorganization of the Eyeliner Business (the “Eyeliner Agreement”). Deem Decl., ¶5.
 14 One of the main purposes of the Eyeliner Agreement is to provide for the joint
 15 exploitation of certain intellectual property, including the ‘519 and ‘212 patents,
 16 throughout the world. Deem Decl., ¶4. In particular, the Eyeliner Agreement provides
 17 for the grant of exclusive, perpetual and irrevocable licenses to use the ‘519 and ‘212
 18 patents to certain entities, including Musion Events Limited (a non-party to this action).
 19 *Id.*

20 The arbitration hearing, presently scheduled in London over a three-day period
 21 beginning July 1, 2014, will determine the extent and scope of the right which Musion
 22 Events Limited has to exploit the ‘519 and ‘212 patents under the terms of the Eyeliner
 23 Agreement. Deem Decl., ¶¶7-10. The right of Musion Events Limited to exploit the
 24 ‘519 and ‘212 patents is expressed in the Eyeliner Agreement to be exclusive, perpetual
 25 and irrevocable, and its rights, assuming they are confirmed by the London arbitration,
 26 would directly impact the quality, territorial extent and status of the rights (if any)
 27 enjoyed by Musion Das Hologram and Maass to the ‘519 and ‘212 patents. Deem Decl.,
 28 ¶¶7-10. This, in turn, would directly impact the right of Musion Das Hologram and

1 Maass to license the ‘519 and ‘212 patents to Hologram USA in the first place, which
 2 goes to the heart of this action and would arguably affect the standing of Plaintiffs to
 3 bring the instant action. *Id.* Indeed, if the arbitration determines that Musion Das
 4 Hologram and Maass did not have the legal capability to enter into a license agreement
 5 with Hologram USA, then Plaintiffs will lack standing to proceed in this action.
 6 Accordingly, given the overlap of parties and legal issues pending in the London
 7 arbitration, this Court may, in its discretion, stay the instant action until such time as the
 8 LCIA issues its award, which would be in the interests of judicial economy. If the
 9 arbitration concludes such that Musion Das Hologram and Maass did not hold
 10 exploitation rights to the ‘519 and ‘212 patents at the time they purportedly granted a
 11 license to Hologram USA, then Plaintiffs’ claims in this action will fail. Deem Decl.,
 12 ¶¶7-10.

13 A party to a lawsuit pending in either state or federal court may seek a stay of the
 14 action pending arbitration of one or more issues raised in such litigation. 9 U.S.C. § 3;
 15 see *Wagner v. Stratton Oakmont, Inc.* 83 F.3d 1046, 1048 (9th Cir. 1996); *Subway Equip.*
 16 *Leasing Corp. v. Forte*, 169 F.3d 324, 329 (5th Cir. 1999). A party who is not a
 17 signatory to the arbitration agreement may have standing to seek a stay of the court
 18 proceeding pending arbitration between other parties if the arbitration would have an
 19 impact on the remaining nonarbitrable claims. *Harvey v. Joyce*, 199 F.3d 790, 795 (5th
 20 Cir. 2000). The district court has discretion either to proceed with the nonarbitrable
 21 claims or to stay litigation of all claims pending the outcome of the arbitration. *U. S. for*
 22 *Use & Benefit of Newton v. Neumann Caribbean Int'l, Ltd.*, 750 F.2d 1422, 1426 (9th
 23 Cir. 1985); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 361 (7th Cir. 1997).

24 “A trial court may, with propriety, find it is efficient for its own docket and the
 25 fairest course for the parties to enter a stay of an action before it, pending resolution of
 26 independent proceedings which bear upon the case. This rule applies whether the
 27 separate proceedings are judicial, administrative, or arbitral in character, and does not
 28 require that the issues in such proceedings are necessarily controlling of the action before

1 the court. In such cases the court may order a stay of the action pursuant to its power to
 2 control its docket and calendar and to provide for a just determination of the cases
 3 pending before it." *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863 (9th
 4 Cir. 1979) citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952);
 5 *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Collins Radio Co. v. Ex-*
 6 *Cell-O Corp.*, 467 F.2d 995-1000 (8th Cir. 1972); *Merritt-Chapman & Scott Corp. v.*
 7 *Pennsylvania Turnpike Comm'n*, 387 F.2d 768, 773 (3d Cir. 1967); *Nederlandse Erts-*
 8 *Tankersmaatschappij v. Isbrandtsen Co.*, 339 F.2d 440 (2d Cir. 1964); *Chronicle Publ.*
 9 *Co. v. National Broadcasting Co.*, 294 F.2d 744 (9th Cir. 1961). See also *Mediterranean*
 10 *Enterps., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1465 (9th Cir. 1983) (same).

11 Presently, in London the issue of exploitation rights to the '519 and '212 patents is
 12 at issue, which will directly impact Musion Das Hologram and Maass' legal ability to
 13 have granted a valid license to Hologram USA. The arbitration was commenced in 2013
 14 (long before the instant action was filed by Maas, Musion Das Hologram and Holgram
 15 USA), and it is expected to be concluded in July 2014, with an award issued 30 days
 16 thereafter. Deem Decl., ¶¶5-11. In the event that the London arbitration determines that
 17 Musion Das Hologram and Maass lacked authority to grant such a license because those
 18 rights are subject to the control of a separate entity, Defendants submit that Plaintiffs will
 19 lose standing to proceed with this action, which supports issuance of a stay until the
 20 London arbitration issues its award.

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III. CONCLUSION

Based on the foregoing, Defendants Pulse Entertainment Corporation, Pulse Evolution Corporation and John Textor respectfully request that this Court dismiss the FAC pursuant to Rule 12(b)(3) and 12(b)(6) for failure to state a claim upon which relief can be granted and improper venue. Alternatively, Defendants seek a more definite statement pursuant to Rule 12(e), and also to stay the action pending the completion of the arbitration now proceeding before the London Court of International Arbitration.

Dated: June 24, 2014

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